UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001

DATE: 01/27/97

CASE NO. 95-INA-92

In the Matter of:

NEIL CLARK
Employer

on behalf of

SILVIA ESTHER VALDERRAMMA
Alien

Before: Holmes, Neusner and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of Unite States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On March 26, 1993, Neil Clark ("Employer") filed an application for labor certification to enable Sylvia Esther Valderramma ("Alien") to fill the position of "Housekeeper, Live In. The Job Service classified the job as "Home Attendant" (AF 84). The job duties for the position, as stated on the application, are as follows:

> Employee will assist elderly couple in getting about and caring for themselves. Will perform general housekeeping, laundering, preparing and cleaning after meals. Notifying physicians and family in the event of a medical emergency. Employers are aged 80 and 83.

(AF 84).

The only stated job requirement for the position is three months of experience in the job offered (AF 84).

In a Notice of Findings ("NOF") issued on May 27, 1994, the CO proposed to deny certification on the grounds, inter alia, that the Employer had rejected qualified U.S. applicants for other than lawful job-related reasons, and failed to show that the job opportunity is clearly open to qualified U.S. workers. See 20 C.F.R. §656.21(b)(6) and §656.20(c)(8). (AF 70-73).

The Employer submitted his rebuttal on or about June 29, 1994 (AF 74-75). The CO found the rebuttal unpersuasive regarding the rejection of four U.S. applicants and issued a Final Determination on June 16, 1994, denying certification (AF 72-75).

On July 27, 1994, the Employer appealed the denial of certification (AF 80-86), and subsequently the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review. The Employer's brief has been received and considered.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to

post-filing recruitment, such good faith requirement is implicit. H.C. LaMarche Enterprises, Inc., 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the present case, the CO determined that the Employer, through its actions, effectively rejected four qualified U.S. applicants (AF 70-73,76-79). For the purpose of this decision, our focus will be on the Employer's actions with respect to U.S. applicants Kim McCullers and Lydia Ayroso.

In the report of recruitment results, dated March 15, 1993, the Employer stated that it had evaluated 16 U.S. applicants, but that none were ready, willing, able, and qualified for the position (AF 62-63). With respect to the two U.S. applicants referred to above, the Employer stated:

> Kim McCullers: we contacted her references and she does not have the required experience.
>
> Lydia Ayroso has moved from the address given and no one at the address and telephone that was left could furnish us with any information as to her whereabouts.

(AF 63).

In the Notice of Findings, the CO stated, in pertinent part, that Ms. McCullers has the required experience, and that the U.S. applicant was told by the Employer that she has too much experience (AF 71). This finding is apparently based upon the response of Ms. McCullers to a N.Y. Department of Labor questionnaire (AF 52-53). With respect to Ms. Ayroso, notwithstanding the Employer's assertion that he was unable to reach her, the CO stated that she was able to reach Ms. Ayroso "by regular mail at the address on her letter of application." Furthermore, Ms. Ayroso confirmed that the Employer never contacted her (AF 71; See also AF 50). Accordingly, the CO directed the Employer to respond to these discrepancies and provide documentation that the applicants were not qualified, willing, or available at the time of initial consideration and referral. Moreover, the CO specifically advised the Employer that this was not to be considered a request to attempt to re-contact these applicants (AF 71).

The Employer's rebuttal includes a letter, dated June 28, 1994, which states, in pertinent part:

> We attempted to check the references of Kim McCullers. Every number she gave to us for her references was incorrect, and she could not, or would not, give further telephone numbers to contact the people.

> Lydia Ayroso-We made numerous attempts to contact her. We once again tried contacting her after we received the proposed noticed of findings. She was not at the telephone listed, and the people who answered the telephone indicated that she was seldom, if ever, there and that they would not take messages for her.

(AF 74).

In the Final Determination, the CO stated: 1. Regarding Ms. McCullers, rather than explain the discrepancy between his report of recruitment and the U.S. applicant's statement, the Employer's rebuttal merely adds another inconsistency. Initially, the Employer stated that he contacted Ms. McCullers' references and she does not have the required experience. Yet, on rebuttal, the Employer alleges that he was unable to contact her references (AF 77; Compare AF 63 and 74). 2. With respect to Ms. Ayroso, rather than seek to explain why the CO was able to contact the U.S. applicant by regular mail, while Employer was unable to reach her, and provide documentation of his alleged attempts to contact the U.S. applicant at the time of initial recruitment, as requested in the Notice of Findings, the Employer's rebuttal consisted of a mere assertion that he made numerous unsuccessful attempts to contact the U.S. applicant, including those made after the Notice of Findings was issued (AF 74).

In conclusion, the CO stated, in pertinent part:

> Based on inconsistencies in the employer's rebuttal and the statements from...U.S. workers, who independently responded to post-recruitment follow-up letter contradicting the employer, employer's actions do not appear to support a position of good faith recruitment. Employer has not documented that there are no U.S. workers qualified, willing, or available for the job opportunity, consequently, this application for alien employment certification is **denied.**

(AF 76). We agree.

Although a written assertion constitutes documentation, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Gencorp, 87-INA-659 (Jan. 13, 1988)(en banc); A.V. Restaurant, 88-INA-330 (Nov. 22, 1988); Carl Joecks, Inc., 90-INA-406 (Jan. 16, 1992). This is particularly true, where, as here, the Employer's statements are not only inconsistent with those of more than one U.S. applicant, but also inconsistent with Employer's own prior statements. Moreover, it is well settled that an employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification. John Hancock Financial Services, 91-INA-131 (June 4, 1992); D Rose Linens, 93-INA-157 (Mar. 18, 1994).

In view of the foregoing, we adopt the CO's determination that the Employer has failed to adequately document that the applicants were not qualified, willing or available at the time of

initial referral. Therefore, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel

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Todd R. Smyth, Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.